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2       UNITED STATES BANKRUPTCY COURT  
3  
4       SOUTHERN DISTRICT OF NEW YORK  
5  
6       Case No. 08-15051-SMB; 09-10371-SMB

6 | In the Matter of:

7 DREIER LLP

8 Debtor.

10 In the Matter of:

11 MARC S. DREIER,

12 Debtor.

14

15 United States Bank

## 16 One Bowling Green

17 New York, New York

18

19 | June 30

20 | 2:11 PM

21

## 22 | B E F O R E:

23 HON. STUART M. BERNSTEIN

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2 HEARING re Gardi Parties' Emergency Motion for a Stay Pending  
3 Appeal.

4

5 HEARING re Order to Show Cause signed on 6/23/2010 (case number  
6 08-15051).

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8 HEARING re Order to Show Cause signed on 6/23/2010 (case number  
9 09-10371).

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Transcribed by: Sharona Shapiro

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P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated.

4 Dreier.

5 MR. LODEN: Good morning, Your Honor. Steve Loden on  
6 behalf of the Chapter 11 Trustee. Good afternoon.

7 THE COURT: Good afternoon.

8 MR. LODEN: I'm used to mornings.

9 MR. LORENZO: Good afternoon, Your Honor. Alex  
10 Lorenzo on behalf of the Gardi parties, Paul Gardi and Alex  
11 Interactive Media.

12 MR. HERBST: Good afternoon, Your Honor. Gary Herbst  
13 from LaMonica, Herbst & Maniscalco on behalf of Sal LaMonica,  
14 the Chapter 7 Trustee for the Marc Dreier estate.

15 MS. WINTERS: Good afternoon. Julia Winters, White &  
16 Case for GSO.

17 MR. CORNEAU: Good afternoon, Your Honor. Joseph  
18 Corneau, Klestadt & Winters for the committee.

19 THE COURT: Go ahead, Mr. Lorenzo.

20 MR. LORENZO: Your Honor, as stated in our papers,  
21 this motion was filed in an abundance of caution. In reviewing  
22 the GSO settlement agreement and Your Honor's order of June  
23 9th, we identified a potential ambiguity, and the concern was  
24 that even were we to be successful on appeal there would be an  
25 argument about equitable mootness.

1           We received the papers last night, and it appears that  
2        all interested parties who responded indicated that there would  
3        be no payment and that there would be no reliance on the bar  
4        order. And thus, assuming that counsel here today will state  
5        on the record that that is the case, I think this issue may be  
6        resolved.

7           THE COURT: Well, I know there'll be no payment and no  
8        exchange of releases, but let me hear about the bar order.

9           MR. LODEN: Your Honor, the bar order does not have  
10       any language that says effectiveness is stayed or delayed. The  
11       bar order has been effected since June 8th and Gardi has been  
12       barred by the bar order since June 8th. They waited fifteen  
13       days to bring this emergency stay motion, not to assert an  
14       irreparable harm because there isn't one, to bring delay and to  
15       cause pain on the estate. That's why they brought this. The  
16       bar order's already effective, they're already stayed, they are  
17       way late in making this so-called emergency motion seeking this  
18       relief now.

19           THE COURT: Why are they late?

20           MR. LODEN: I'm sorry, Your Honor?

21           THE COURT: Why are they late? Has something occurred  
22       that would moot their motion?

23           MR. LODEN: If they truly believe that they would be  
24       irreparably harmed by enforcement of the bar order, this motion  
25       should have been filed on the 8th or 9th. They waited two

1 weeks. And yesterday they asked the judge in the District  
2 Court to delay briefing on the appeals. This isn't about  
3 irreparable harm or any fear that they will be enjoined; they  
4 already are. This is about delay.

5 THE COURT: Mr. Lorenzo, I agree that the bar order is  
6 presently in effect and isn't based upon the payment.

7 MR. LORENZO: Your Honor --

8 THE COURT: The trustee doesn't have to deliver it, or  
9 the trustees don't have to deliver their own releases until  
10 they get paid. But the bar order's in effect.

11 MR. LORENZO: Well, and I think the point that Mr.  
12 Loden raised, we're not worried about ourselves arguing that  
13 we're somehow equitably moot from challenging. If the bar  
14 order applies to use we understand that. The concern is that  
15 some other interested party would get up on appeal and argue  
16 that somehow our appeal did not have merit because the whole  
17 issue was moot. So that is the concern raised and that's the  
18 irreparable harm.

19 THE COURT: What issue is moot?

20 MR. LORENZO: That the issue of -- you know, we -- as  
21 you understand, Your Honor, we respectfully disagree with the  
22 decision reached in the --

23 THE COURT: But if you win, the settlement order gets  
24 vacated and so would the release.

25 MR. LORENZO: Well, if that is the case, Your Honor,

1 then that issue is resolved.

2 THE COURT: But how could it not be?

3 MR. LORENZO: Well, there was a concern that perhaps  
4 GSO would act in reliance of the bar order and take actions and  
5 then argue on appeal that they had acted in reliance on the bar  
6 order and that their actions could not be undone. This is --

7 THE COURT: Well, you didn't make that argument in  
8 your papers.

9 MR. LORENZO: Well, we argued that there would be  
10 reliance on the bar order, Your Honor.

11 THE COURT: You argued that GSO would rely on the bar  
12 order? I don't recall that argument. I thought you just made  
13 a general statement that it would be a permanent injunction  
14 barring claims against GSO. But I think you ought to raise  
15 your own rights and not somebody else's rights. Isn't that --

16 MR. LORENZO: Well, Your Honor, the concern was in  
17 protecting our own rights that this was an issue of  
18 uncertainty. And unlike the Verition settlement agreement  
19 where the settlement monies clearly go into escrow, here  
20 there's some uncertainty as to what happens. I understand that  
21 the release state does not occur until the order is final and  
22 nonappealable. But the payment could occur.

23 THE COURT: Why would they pay him? Then they'd have  
24 to chase the trustee for the money.

25 MR. LORENZO: Your Honor, perhaps they're looking to,

1 you know, jam us out by paying early and then arguing mootness.

2 THE COURT: Teach you a lesson so they're out a  
3 release of nine and a half million dollars?

4 MR. LORENZO: I can't speak for other parties.

5 THE COURT: All right.

6 MR. LORENZO: I know that we are not --

7 THE COURT: So you started out, I thought, saying that  
8 somehow this whole argument is academic, but now you're saying  
9 it's not. So let me hear your argument.

10 MR. LORENZO: Well, the point that I made earlier --

11 THE COURT: What's the relief you want today?

12 MR. LORENZO: Your Honor, we have asked for a stay.

13 In viewing the responses that were filed last night, it appears  
14 that all interested parties have indicated that there will be  
15 no reliance and the GSO will not be making payment.

16 Assuming --

17 THE COURT: All they said is GSO will not be making  
18 payment, which as I read the settlement means that the trustees  
19 will not be delivering a release.

20 MR. LORENZO: Understood, Your Honor.

21 THE COURT: Okay. And that's what GSO said and that  
22 is what the parties said GSO said. That's not what you're  
23 saying.

24 MR. LORENZO: The concern is if there's an argument  
25 made by any party that there was reliance on a bar order. My

1 understanding of reading the objections to our motion was that  
2 there was in indication that there would not be reliance on  
3 that. But if counsel --

4 THE COURT: That's not what it says. You misread it.

5 MR. LORENZO: I apologize --

6 THE COURT: Why do they have to stand up and say you  
7 misread it?

8 MR. LORENZO: I apologize then, Your Honor. Then the  
9 relief we are seeking is to prevent anyone from relying on the  
10 bar order pending appeal.

11 THE COURT: Where do you say that in your motion?

12 MR. LORENZO: I believe, Your Honor -- let me just  
13 flip -- on page 11.

14 THE COURT: Okay, I'm looking at page 11.

15 MR. LORENZO: At the top, second sentence down, "And  
16 two, the bar order will become effective and creditors and  
17 parties including Gardis will be permanently enjoined and  
18 barred from commencing any action against the GSO parties. The  
19 consummation or execution of either act may render moot the  
20 outcome of the Gardi parties' appeal."

21 THE COURT: How can it render the Gardi parties'  
22 appeal moot though?

23 MR. LORENZO: The concern would be -- and obviously  
24 this is in abundance of caution and to protect rights -- that  
25 there would be a reliance by GSO or some other party --

1                   THE COURT: How?

2                   MR. LORENZO: Perhaps they -- they make a filing or  
3 they make a business decision based on the fact that they  
4 believe that the Gardi parties and any other party is barred  
5 from suing them.

6                   THE COURT: Like what decision? You don't say any of  
7 this in your papers, you know.

8                   MR. LORENZO: I can't --

9                   THE COURT: Anything else you don't say that you want  
10 to tell me now?

11                  MR. LORENZO: Your Honor, the concern was that  
12 they would take some sort of action on reliance of the bar  
13 order.

14                  I think the other point to be raised is it's sort of  
15 two sides of the same issue where they say that there's no need  
16 for this because no one is going to act in reliance and no  
17 monies are going to be paid. They can't argue at the same time  
18 that there is any issue then with staying the entry of the  
19 order if no one is going to rely on it or --

20                  THE COURT: That's not what they say though. You keep  
21 saying that and that's not what they said. The order has many  
22 parts. One of the parts involves a payment by GSO and, for  
23 lack of a better phrase, a simultaneous delivery of releases.

24                  MR. LORENZO: Understood, Your Honor.

25                  THE COURT: That's one part of the order, and that

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1 apparently is not going to occur until there's a final order.  
2 But there are other parts of the order that are immediately  
3 effective and don't depend on payment.

4 MR. LORENZO: And my understanding of the other two  
5 parts were there's a coordination agreement with the government  
6 and then there's the bar order. And the points --

7 THE COURT: The coordination agreement just depended  
8 on my approving the settlement agreement which I did. So  
9 that's --

10 MR. LORENZO: Right, and we have not raised that as an  
11 issue, Your Honor. The two points that we raised in our papers  
12 were the payment and the bar order.

13 THE COURT: But all you say about the bar order is  
14 that the bar order will become effective and creditors and  
15 parties-in-interest and parties including the Gardi parties  
16 will be permanently enjoined and barred from commencing any  
17 action against the GSO parties. You don't say anything about  
18 reliance here or that it will become moot because third parties  
19 will change their positions.

20 I'm not concerned about GSO; it's a party to the  
21 appeal and what it does it does at its risk. And usually  
22 equitable mootness arises because there are third parties that  
23 change their position, stock is issued under a plan or  
24 something like that. But I don't see that here. Nobody else  
25 has come in and raised a concern of being prejudiced. So tell

1 me how Gardi's going to be prejudiced.

2 MR. LORENZO: And I think that circles back. The  
3 concern was an abundance of caution that the party would appear  
4 and argue prejudice. Having filed this motion and received the  
5 responses from the four interested parties, none of them have  
6 indicated that they would --

7 THE COURT: Okay. Are you still pressing your motion?

8 MR. LORENZO: Subject to counsel having filed  
9 objections indicating that they stand by their papers, our  
10 understanding is that the issue may be resolved, Your Honor.

11 THE COURT: Okay. So let me -- before you respond,  
12 you've read their papers?

13 MR. LORENZO: Yes.

14 THE COURT: Are you still seeking a stay pending  
15 appeal?

16 MR. LORENZO: The only issue, Your Honor, would be if  
17 there was -- if our interpretation -- and you've indicated that  
18 perhaps it is incorrect.

19 THE COURT: The papers say what they say. You've read  
20 the papers. Are you still pressing your motion?

21 MR. LORENZO: We are because of the uncertainty --

22 THE COURT: Okay, fair enough. Let me hear from the  
23 other parties. I didn't mean to cut you off --

24 MR. LORENZO: No, no, no.

25 THE COURT: -- is there any argument you want to make

1 with respect to your motion?

2 MR. LORENZO: No, Your Honor, we stand on our papers.

3 THE COURT: Okay, fine.

4 MR. LODEN: Your Honor, it's very simple. As the  
5 Court pointed out, if the bar order is reversed on appeal, the  
6 bar order is of no effect. There's no irreparable harm in  
7 the bar order being effective now pending resolution of the  
8 appeal.

9 Counsel repeatedly said that at least the Chapter 11  
10 Trustee has said in her papers that we will not be relying on  
11 the bar order or a reliance on the bar order.

12 THE COURT: How would you --

13 MR. LODEN: That word does not appear.

14 THE COURT: The bar order runs to the benefit of GSO.  
15 It doesn't run to your benefit. How are you going to rely on  
16 the bar order?

17 MR. LODEN: We can't. It doesn't appear in --

18 THE COURT: It doesn't -- the bar order doesn't affect  
19 you.

20 MR. LODEN: It -- other than our ability to consummate  
21 the settlement, that's exactly right. To the extent that  
22 counsel would have it that we should come in and demonstrate  
23 that we won't be harmed by a stay, that's not the standard.  
24 The standard is they have to show that they will be irreparably  
25 harmed, amongst other things that the committee and other

1 parties have pointed out.

2                   Their pleading is woefully inadequate on all of those  
3 points. So pick and choose which reason to deny it but at the  
4 end of the day it should be denied. They have not met the  
5 burden.

6                   THE COURT: Okay.

7                   MR. HERBST: Your Honor --

8                   THE COURT: Yes?

9                   MR. HERBST: -- very briefly. And I'm sure GSO will  
10 speak to this, but the real answer here is they're looking for  
11 a commitment that GSO and the trustees won't come to some  
12 agreement in the future, I guess, that the payment will be  
13 made. That's not required. And if that payment ever does  
14 get made, GSO does it at its own risk. They know about the  
15 appeal.

16                  THE COURT: Well, he's not saying that. He's saying  
17 that but he's saying really that he's concerned GSO will do  
18 something in reliance on the release which will affect the  
19 rights of third parties and then somebody will come in and say  
20 that can't be unwound.

21                  MR. HERBST: Well, I think it's clear if Your Honor's  
22 decision were to get reversed on appeal then it's vacated. And  
23 their reliance of that would be a tremendous stretch.

24                  THE COURT: But it doesn't get --

25                  MR. HERBST: And I'm not --

1                   THE COURT: -- it doesn't get vacated on appeal if it  
2 becomes equitably moot because you can't unscramble the egg.  
3 That's the argument.

4                   MR. HERBST: I think the real problem is GSO would be  
5 likely liable for making the payment and then have to, as you  
6 said, chase the trustees or have to be potentially liable for a  
7 second go round if they made the payment. They said they're  
8 not going to, but I don't think that it should be a condition  
9 of them withdrawing their argument or Your Honor denying the  
10 motion.

11                  THE COURT: Yes?

12                  MS. WINTERS: Just to clarify GSO's position. As we  
13 stated in our papers, we have no intention of paying the  
14 settlement amount before the Gardi appeal runs its course. I'm  
15 not sure what other action on reliance of --

16                  THE COURT: Somebody sues you, you'll say you have a  
17 release, that's what you'll say, and that way you'll rely on  
18 it.

19                  MS. WINTERS: Other than that, we will await the  
20 appeal and consider the rest of the order effective until such  
21 time as its either confirmed or reversed on appeal.

22                  THE COURT: Okay. Yes, sir?

23                  MR. CORNEAU: On behalf of the committee, very  
24 briefly. We join in the trustee's argument, obviously, but  
25 think it's important to point out that -- or to add to the fact

1 that the Gardi parties failed to meet three of the four prongs  
2 for a stay pending appeal, not just one. In any event, the  
3 test is they have to meet all four. And --

4 THE COURT: You think they really have to convince me  
5 that I think I'm going to be reversed? That's a pretty tough  
6 argument to win. It would never be a stay pending appeal if  
7 that were the question.

8 MR. CORNEAU: I'm just going to add, Your Honor, that  
9 the pleading is inadequate. It just doesn't meet the test.

10 THE COURT: Okay.

11 MR. CORNEAU: Thank you, Your Honor.

12 THE COURT: Anyone else?

13 (No audible response)

14 THE COURT: By order dated June 8, 2010, hereinafter  
15 the Settlement Order, the Court approved the settlement  
16 embodied in two agreements described at length in the Court's  
17 April 28, 2010 decision.

18 The agreement between the trustees and GSO Capital  
19 Partners requires GSO to pay 9.5 million to the trustees in  
20 exchange for releases from the trustees. In addition, the  
21 Settlement Order includes a provision barring certain third  
22 party claims against GSO. GSO is not required to transfer  
23 settlement proceeds until the Settlement Order becomes final  
24 and nonappealable.

25 Paul Gardi and Alex Interactive Media, LLC,

1 collectively Gardi, appealed from a settlement order and now  
2 seek a stay pending appeal of so much of the Settlement Order  
3 as approved the settlement with GSO and apparently also bars  
4 third party claims.

5 The stay is denied for the reasons that follow. When  
6 deciding a motion for a stay pending appeal a Court must  
7 consider four factors. One, whether the movant has made a  
8 strong showing of likelihood of success on the merits. Two,  
9 whether the movant will be irreparably injured absent the stay.  
10 Three, whether the issuance of the stay will substantially  
11 injure the other parties-in-interest in the proceeding. And  
12 four, where the public interest lies. *In re DJK Residential,*  
13 LLC, 2008 WL 650389, at 2 (S.D.N.Y. Mar. 7, 2008). The movant  
14 bears the burden of establishing his right to a stay, *Id.*

15 Initially, Gardi has failed to demonstrate, as he  
16 must, a substantial possibility of success on appeal. See  
17 *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d  
18 Cir.1993). Gardi's motion repeats the same arguments I  
19 considered at length and rejected in a forty-two page decision.

20 The aspects of the decision that most concern Gardi  
21 relied on two decisions rendered by Judge Rakoff on  
22 substantially similar questions, second Circuit law addressing  
23 the treatment of Ponzi scheme victims in equitable  
24 receiverships and recent Second Circuit precedent relating to  
25 the enforceability of constructive trusts in bankruptcy

1 proceedings.

2                   Gardi does not suggest that I overlooked any arguments  
3 or controlling law. He merely disagrees with the outcome.  
4 Suffice it to say that if I thought he was right then I would  
5 have decided the matter differently, and the possibility that I  
6 was wrong is not enough to carry his burden on this element.

7                   More important, Gardi has failed to demonstrate that  
8 he will be irreparably harmed absent a stay. "A showing of  
9 irreparable harm is the principal prerequisite for the issuance  
10 of a stay under Bankruptcy Rule 8005." DJK, 2008 WL 650389, at  
11 4, (citations omitted).

12                  Gardi is concerned that his appeal will become moot  
13 because, one, GSO will pay the settlement and the trustees will  
14 release GSO; and two, the bar order in the release will  
15 permanently enjoin actions against GSO. Gardi's concern is  
16 remote and speculative and does not, therefore, rise to the  
17 level of irreparable harm. See In re Calpine Corp., 2008 WL  
18 207841, at 4 (Bankr. S.D.N.Y. Jan. 24, 2008).

19                  As noted, GSO is not obligated to fund the settlement  
20 until the Settlement Order becomes final, and it has stated in  
21 its opposition papers that it has no intention of paying until  
22 then. In other words, the mere filing of the noticed appeal  
23 state payment by GSO and a release by the trustees.

24                  Even if GSO waived the condition of finality and paid  
25 the trustees, the transaction could be unwound if the

1 Settlement Order was reversed; the trustees would repay GSO and  
2 the release they delivered would be void. If the trustees  
3 could not repay GSO that would be GSO's problem. The finality  
4 requirement of the settlement agreement protects GSO against  
5 that possibility. And if GSO pays before then, it does so at  
6 its own risk.

7 Gardi's concern about the part of the Settlement Order  
8 that bars third party claims against GSO is even weaker. If  
9 the Settlement Order is vacated the injunction will also be  
10 vacated and Gardi would be free to sue GSO, subject, of course,  
11 to the automatic stay. His concern expressed at oral argument,  
12 though not in his papers, that GSO could rely on a release and  
13 thereby moot the appeal is rank speculation.

14 As to the public interest, I agree with Gardi that it  
15 is served by, quote, "a fair and efficient bankruptcy system".  
16 I also agree that, quote, "The approval of a settlement  
17 agreement that contravenes the Bankruptcy Code is clearly  
18 outside the public interest."

19 I disagree, however, that the public interest will be  
20 served by staying the order because Gardi has failed to  
21 demonstrate, both in his opposition to the original settlement  
22 motion and in the current motion, that the order contravenes  
23 the Bankruptcy Code. Furthermore, there is a strong interest  
24 in the finality of orders, particularly in bankruptcy cases.  
25 Calpine, 2008 WL 207841, at 7.

1           Lastly, I agree with Gardi that a stay would not  
2 substantially injure other parties-in-interest. Nevertheless,  
3 in weighing the four factors, and particularly given the  
4 absence of irreparable harm, his motion for stay pending appeal  
5 will be denied. Submit order.

6           Anything else?

7           MR. LODEN: Thank you, Your Honor.

8           THE COURT: Thank you.

9           MR. LODEN: If I understood the last part, we'll  
10 submit an order?

11           THE COURT: Submit an order.

12           MR. LODEN: One other matter, as the Court may recall,  
13 at the last hearing there was a discussion about Ms. Gowan's  
14 schedule to appear at the continued hearing on the trustee's  
15 agreement.

16           THE COURT: Right.

17           MR. LODEN: And we talked about a date late in July to  
18 allow discovery to go forward. What I wanted to raise with the  
19 Court is that we have now responded to the document request  
20 that Gardi served and Ms. Gowan is actually being deposed  
21 tomorrow with respect to that matter. So what we would suggest  
22 is that it go on the calendar along with the Verition  
23 settlement on July 15th.

24           THE COURT: Have you spoken to Verition? Is that  
25 acceptable to Verition?

1                   MR. LODEN: Verition is already going to be here on  
2 the 15th for their settlement agreement hearing. That's what's  
3 already on the 15th.

4                   THE COURT: Isn't that part of the Verition settlement  
5 though?

6                   MR. LODEN: The trustee agreement? No. They're  
7 completely separate.

8                   THE COURT: Oh, this is just with respect to the  
9 trustee agreement?

10                  MR. LODEN: Correct, Your Honor, correct.

11                  THE COURT: All right. Is July 15th all right with  
12 Gardi?

13                  MR. LORENZO: Your Honor, unfortunately I'm actually  
14 out that week. I understood that it was going to be the  
15 following week.

16                  THE COURT: All right.

17                  MR. LORENZO: I don't know if there's a date that's  
18 available the following week?

19                  MR. LODEN: Your Honor, I'll be here that week from  
20 Houston. I know that other counsel for Gardi has appeared at  
21 hearings as well.

22                  THE COURT: Well, you're springing this on him today.  
23 He says he plans to be out that week.

24                  MR. LORENZO: Other parties have appeared for Dreier,  
25 LLP -- Ms. Gowan also, Your Honor.

1                   THE COURT: Will you be available the next week, the  
2 week of July 12th?

3                   MR. LODEN: I think it's the following week, Your  
4 Honor --

5                   THE COURT: The 19th.

6                   MR. LODEN: -- the 19th.

7                   THE COURT: I'm sorry.

8                   MR. LODEN: The 22nd?

9                   THE COURT: Well, if there's going to be an  
10 evidentiary hearing I'll put you on in the afternoon if it's  
11 going to take time. I'll put --

12                  MR. LODEN: Ms. Gowan's direct testimony is being  
13 offered via proffer, so --

14                  THE COURT: I'll put you on the 22nd. I don't have  
15 many matters on now. I don't know how crowded it's going to  
16 get. Just tell Ms. Parks so she'll put it on the calendar.

17                  MR. LODEN: Okay.

18                  THE COURT: Is that all right with everybody, the  
19 22nd?

20                  MR. LORENZO: Yes.

21                  THE COURT: All right, 22nd at 10 o'clock.

22                  MR. HERBST: And I just need to check with Mr.  
23 LaMonica but I'm available, Your Honor, and I'll just make sure  
24 and I'll contact the parties if there's any problem.

25                  THE COURT: Okay. All right. Let us know if there's

1 a problem.

2 IN UNISON: Thank you, Your Honor.

3 THE COURT: Thank you.

4 (Proceedings concluded at 2:33 p.m.)

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5 true and accurate record of the proceedings.

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